IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

WEDNESDAY, THE 12TH SEPTEMBER 2007 / 21ST BHADRA 1929

RFA.No. 122 OF 2006()

OS.309/2003 OF I ADDL.SUB COURT,ERNAKULAM

APPELLANT/DEFENDANTS

1. VEEPATHUMMA, AGED 60 YEARS,
KUNNATHU VEERAN KANNAKERIPARAMBIL,
KAKKANAD KARA, KAKKANAD VILLAGE.

2. E.IBRAHIM, AGED 35 YEARS,
S/O.VEEPATHUMMA, KUNNATHU VEERAN,
KANNAKERIPARAMBIL, KAKKANAD KARA, KAKKANAD VILLAGE

BY ADV. SRI.M.P.ASHOK KUMAR

RESPONDENTS: PLAINTIFF

AMEER RAWTHER, AGED 50 YEARS,
S/O.HAJI MUHAMMED HUSSAIN RAWTHER,
PUTHUVALLIKUDIYIL, KAKKANAD KARA,
KAKKANAD VILLAGE.

ADDITIONAL RESPONDENT NO.2:

JOHN THOMAS, AGED 45, S/O.. K.K. THOMAS,
VILLA NO.1, NOEL PALM DALE,
KUSUMAGIRI P.O., KOCHI-30.

(ADDL. RESPONDENT NO. 2 IS IMPLEADED AS PER ORDER DATED 18.8.2007 ON I.A. 3070/2007)

R1 BY ADV. SRI.DINESH R.SHENOY
ADDL. R2 SRI.BABU CHERUKARA

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 12/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R.F.A. 122 OF 2006

ORDER ON I.A. NO. 737/2006 IN R.F.A. 122/2006
//DISMISSED //

12TH SEPTEMBER, 2007.

SD/-
P.R. RAMAN, JUDGE.

SD/-
V.K. MOHANAN, JUDGE.

// TRUE COPY //

P.S. TO JUDGE.

KNC/-

P.R. RAMAN & V. K. MOHANAN, JJ.

R.F.A. NO. 122 OF 2006

DATED THIS, THE 12TH DAY OF SEPTEMBER, 2007.

J U D G M E N T

Raman, J.

Appellants are the defendants in O.S. 309 of 2003 on the file of the Sub Court, Ernakulam. The first respondent herein, Ameer Rawther is the plaintiff who instituted the suit for realisation of money. According to the plaintiff, he entered into an agreement for sale of an extent of 30 cents of land belonging to the defendants. Ext.A1 dated 24.8.1995 is the agreement produced in the case. An amount of Rs. 2,50,000/- altogether was paid in two installments. According to the plaintiff, the defendants failed to perform their obligation of contract, more particularly, in the matter of measurement of land in spite of specific request made in that behalf. However, after the period of contract, since the defendant did not return the advance amount with interest, the suit was instituted. The defendant contended that it was the plaintiff who failed to perform his obligation of contract in not paying the balance consideration, as agreed upon between the parties. As per Ext.A1 agreement, the centage value fixed by way of consideration is Rs. 35,000/-. The total extent comes to 30 cents. On the

side of the plaintiff, he gave evidence as PW.1 and Exts.A1 to A3 were marked. The second defendant gave evidence as DW.1 and Exts.B1 and B2 were marked on their side. The court, after considering the oral evidence of both PW.1 and DW.1, drew an inference that the plaintiff was at fault as he could not pay the balance consideration. However, since the defendant did not prove that he suffered any damages as a result of the contract being broken at the instance of the plaintiff, the court gave a decree in favour of the plaintiff for an amount of Rs. 2,50,000/- with a nominal interest at the rate of 6% from the date of decree till realisation. Aggrieved thereby, the defendants have preferred this appeal.

2. Learned counsel Smt. Priya, appearing for the appellants would contend that the court below having found that the fault is on the plaintiff in not paying the balance consideration, it ought to have held that by virtue of the clause contained in the agreement the entire advance amount stands forfeited and hence there is no justification for the court below in granting the decree as prayed for. It is further contended that the amount received as advance was invested in another property in the hope that the balance amount will be received from the plaintiff and the plaintiff having failed, he suffered loss.

3. Per contra, the learned counsel Sri.Dinesh R. Shenoy would contend that even the finding of the court below in para 9 of the judgment that the plaintiff is at fault is wrong. The said contention is raised based on the provisions of order 41 Rules 22 and 33 of the Code of Civil procedure. According to him, when there is a specific averment in the plaint that the defendant failed to measure the property in spite of the specific demand made in this behalf and in the absence of any denial of the averment in the written statement, the said fact must be taken as an implied admission on the part of the defendant and hence the court below was not justified in holding that the plaintiff was at fault. He would also submit that this is a fit case where the court ought to have awarded costs also. It is also contended that the argument on the part of the learned counsel for the appellant that the advance amount was invested in some other property is not a plea raised in the written statement nor any evidence was adduced in that behalf.

4. Heard the rival submissions made by the parties. In paragraph 2 of the plaint, it is specifically averred as follows:

> "As per the contract, the plaintiff called upon the defendants to measure out and demarcate the plaint schedule property to convince him of the extent and to hand over the original documents as agreed. But the defendants kept putting off the measurement. . . . . But when the plaintiff again approached the

> defendants to measure out the property, they again avoided the issue giving lame excuses. The plaintiff finally realized that the defendants were not prepared to do so."

5. In the written statement, however, there is no specific denial of these averments. Further, even though the plaintiff specifically made an averment to that effect in support of his plea in the proof affidavit, there is no such denial in the proof affidavit filed by the defendants. It is pointed out by the learned counsel for the respondent that in such circumstances, the finding of the court below that the plaintiff is at fault is not correct and we find strong force in this contention.

6. The forfeiture clause contained in the agreement stipulates that the advance will stands forfeited in case there is a failure on the part of the buyer to perform his part of the contract. On the other hand, if there is a failure on the part of the seller to perform his part of the obligation, then it gives a right to the buyer to specifically enforce the contract. In this case, the plaintiff has chosen to seek a decree for return of the amount with interest thereon, which is an alternate relief available to him under law. It has further to be noticed that even assuming for arguments sake that the plaintiff is at fault, the forfeiture clause of this nature will get attracted and the amount mentioned therein become payable, provided, there is proof to

show that the seller has suffered any damages. Even if the amount mentioned in the contract is taken as liquidated damages, whether the seller has suffered any damages is a matter to be proved by adducing cogent evidence in the case, in which event only the amount as fixed in the agreement could be realised. We have gone through the written statement; but could not find any plea regarding sustaining of any damages by the defendants. True that such a plea was raised in the proof affidavit though without a plea; but there is no corroborating evidence adduced to show that any such damages was suffered by the defendants. Hence the court below was perfectly justified in granting a decree for reliasation of an amount of Rs. 2,50,000/- with interest at 6%. Though the court below has awarded interest from the date of the decree, we do not think that we should disturb the decree. Though the learned counsel for the respondent contended that he is entitled for interest even from the date of the plaint, we do not think this is a fit case where interest should be awarded from the date of the suit and we confirm the award of interest from the date of decree as awarded by the court below. However, we find that the plaintiff has instituted the suit as an indigent person. The court below has not awarded any costs. As per Order 33 Rule 10 of the Code of Civil Procedure, where the plaintiff succeeds in the suit, the court shall calculate the amount of court-fees which

would have been paid by the plaintiff if he had not been permitted to sue as an indigent person and such amount shall be recoverable by the State Government from any party ordered by the decree to pay the same and shall be a first charge on the subject matter of the suit. No specific order is made in this regard. We find the court below has failed to pass necessary orders as contemplated by the above provision. Hence we direct that the suit stands allowed with costs and there will be a first charge on the decreed amount of the court fee payable by the plaintiff at the first instance in favour of the State. As and when any amount is recovered towards the decree amount, the court fee payable in the suit shall be first adjusted. However, in the facts and circumstances, we do not award any costs in this appeal and direct the parties to suffer the same.

7. The contention of the additional second respondent impleaded in this case, who is a subsequent purchaser, is left open to be decided by the court below in accordance with law. The amount already deposited by the additional second respondent will continue to be in deposit until such claim is considered and decided by the court below. This Court in I.A. 3069/2007 has lifted the attachment over the property purchased by the additional second respondent (petitioner in I.A. 3069/2007) on condition that he shall deposit the entire decree amount. Pursuant to the order, the amount has

already been deposited. The court below in such circumstances, will hear the parties and pass appropriate orders. Until such time, the amount will continue to be in deposit.

The appeal is allowed by way of remand.

P.R. RAMAN,
(JUDGE)

V. K. MOHANAN,
(JUDGE)

knc/-